

1040400

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Site

East Helena

0191601

File #

1.01.04.00

Confidential: Yes

No

Admin. Record: Yes

No

Key Words/Comments:

Draft Consent
Decree sent with special
notice to ASARCO and ARCO.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

CIVIL ACTION NO.

v.

ASARCO, INCORPORATED; and

ANACONDA MINERALS COMPANY;

Defendants.

ENVIRONMENTAL PROTECTION
AGENCY

FEB 27 1990

MONTANA OFFICE

CONSENT DECREE

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ATTACHMENTS

1. Exhibit 1. Record of Decision: East Helena Smelter Site,
Process Ponds Operable Unit, East Helena, Montana
(November 22, 1989)
2. Exhibit 2. Work Plan: Remedial Design/Remedial Action for
the East Helena Smelter Site, Process Ponds Operable
Unit, East Helena, Montana (, 1990)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

CIVIL ACTION NO.

v.

ASARCO, INCORPORATED; and

ANACONDA MINERALS COMPANY;

Defendants.

CONSENT DECREE

This Consent Decree (the "Decree") is made and entered into by the United States of America ("United States"), on behalf of the United States Environmental Protection Agency ("EPA"), and the Defendants, Asarco, Incorporated ("ASARCO"); and Anaconda Minerals Company (Anaconda), (collectively referred to herein as the "Defendants"), pursuant to the applicable provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA").

WHEREAS, the United States, on behalf of the Administrator of EPA, filed a complaint ("Complaint") in this Court pursuant to Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, for injunctive relief and recovery of response costs in connection with the releases and threats of releases of hazardous substances at the East Helena Smelter Site (the "Site") located in or near East Helena, Montana;

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WHEREAS, EPA, pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, proposed the Site for inclusion on the National Priorities List ("NPL") which is set forth at 40 C.F.R. Part 300, Appendix B;

WHEREAS, ASARCO is presently the owner and operator, and ASARCO's predecessors in interest were the owners or operators, of the East Helena Smelter. The smelter has been in operation since 1888 processing ores and concentrates to produce lead bullion. The processing of these ores generated and continue to generate emissions of metals and arsenic resulting in contamination of the air, soils and water at the Site;

WHEREAS, in 1927, Anaconda constructed and operated a zinc smelting plant at the Site for the purpose of recovering zinc from the East Helena smelter's waste slag. The zinc plant was purchased by ASARCO in 1972 and operated by ASARCO until 1982. The smelting of the waste slag generated emissions of metals and arsenic resulting in contamination to the air, soils and water at the Site;

WHEREAS, the Defendants were the owners or operators, or are presently the owners or operators, or the Defendants' predecessors in interest were the owners or operators, of a facility or facilities, as defined in Sections 101(9) and 101(20) of CERCLA, 42 U.S.C. §§ 9601(9) and 9601(20), located at the Site, from which hazardous substances, as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), have been released;

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WHEREAS, hazardous substances from the Site have been, are currently being, and have continued potential to be released, as defined in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), into the environment through, inter alia, the air, soil, surface water, and groundwater at the site and surrounding area;

WHEREAS, EPA has determined that the actual and threatened releases of hazardous substances at and from the Site may present an imminent and substantial endangerment to public health and welfare and the environment;

WHEREAS, EPA has responded and will continue to respond to the releases and threatened releases of hazardous substances at and from the Site and, thereby, has incurred and will continue to incur response costs within the meaning of Sections 101(25) and 107(a) of CERCLA, 42 U.S.C. §§ 9601(25) and 9607(a);

WHEREAS, in response to releases or threatened releases of hazardous substances at the Site, a remedial investigation and feasibility study ("RI/FS") is being performed by ASARCO, pursuant to a Sections 104(b) and 122(a) and (d)(3) of CERCLA, 42 U.S.C. §§ 9604(b) and 9622(a) and (d)(3), under an Administrative Order on Consent, EPA Docket No. CERCLA-VIII-89-10, dated December 30, 1988;

WHEREAS, the site has been divided into five operable units: the process ponds and fluids, ground water, surface water and soils, the slag pile and the ore storage areas;

WHEREAS, based on the ongoing RI/FS and other information contained in the Administrative Record, EPA has

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selected a remedy for the first Operable Unit - Process Ponds - that addresses cleanup of a portion of the Site. The Operable Unit addressed by this Consent Decree will remediate the process fluids ponds used in the smelter operations process by abating the release and threatened release of hazardous substances from these sources and will resolve Defendants' past response costs. Remediation of the entire Site will be addressed subsequently;

WHEREAS, on November 22, 1989, EPA issued a Record of Decision ("ROD"), attached hereto as Exhibit 1, which documents the selection of the first Operable Unit remedy for the Site;

WHEREAS, the United States alleges that the Defendants are responsible parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and are thereby liable under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, for the releases and threat of releases of hazardous substances at and from the Site into the surface water, ground water, land surface, subsurface strata, and the ambient air in the vicinity of the Site;

WHEREAS, the Defendants desire to settle the claims made against them by the United States;

WHEREAS, the Defendants agree to undertake all activities and complete all actions required by this Decree;

WHEREAS, in consideration of, and in exchange for the promises and the mutual undertakings and covenants herein, and intending to be bound legally hereby, the Defendants and the

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United States, by their authorized representatives, have agreed to the entry of this Decree; and

WHEREAS, settlement of these matters governed by this Decree without further litigation is in the public interest and an appropriate means of resolving such matters.

THEREFORE, without adjudication of any issue of law or fact and upon the consent of the parties hereto, it is hereby ORDERED, ADJUDGED, AND DECREED, as follows:

I.
JURISDICTION

The Court has jurisdiction over the subject matter of this action and over the Parties to this Decree pursuant to Sections 106, 107, 113, and 122 of CERCLA, 42 U.S.C. §§ 9606, 9607, 9613, and 9622, and 28 U.S.C. §§ 1331 and 1345. The Court has personal jurisdiction over all Defendants. Venue is proper in this judicial district under Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and under 28 U.S.C. § 1391(b). The Complaint filed in this action states claims upon which relief can be granted.

II.
PARTIES BOUND

A. This Decree shall apply to and be binding upon the Defendants, including their divisions, officers, employees, directors, agents, successors, and assigns, and upon the United States. The Defendants shall provide a copy of this Decree, as entered, and a copy of all relevant additions to this Decree, to

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each contractor or subcontractor retained to perform any portion of the Work (as defined in Section III of this Decree) required by this Decree. The Defendants shall condition any contract or subcontract for the performance of Work by contractors, subcontractors, laboratories, consultants, or other persons on compliance with all terms and conditions of this Decree and shall ensure compliance with such terms and conditions.

B. The undersigned representative of each party to this Decree certifies that he or she is fully authorized by the party or parties whom he or she represents to enter into the terms and conditions of this Decree and to execute and to legally bind that party to it.

C. Each Defendant shall be responsible for carrying out all actions required by the terms and conditions of this Decree. If one of the Defendants becomes insolvent or is unable to pay for or perform the Work, regardless of whether formal bankruptcy proceedings have been instituted, or if for any other reason one of the Defendants does not participate in the implementation of this Decree, the remaining Defendant agrees and commits to complete the Work and otherwise comply with the provisions of this Decree.

D. No change in ownership, or corporate, joint venture, partnership, or other legal status shall in any way alter the status or responsibilities of the Defendants under this Decree.

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III.
DEFINITIONS

Unless set forth herein to the contrary, the terms of this Decree shall have their ordinary meanings unless defined in CERCLA or the National Contingency Plan ("NCP"), in which case the CERCLA or NCP definitions shall control. For purposes of this Decree and the exhibits and appendices attached hereto, the following terms shall have the meanings set forth below:

A. **"Contractor"** means any person, company or companies, and their respective agents and subcontractors retained by either or both of the Defendants to undertake any Work under this Decree.

B. **"Day"** means calendar day. If a deliverable or activity is due on a day which falls on a weekend or Federal holiday, it shall be deemed due on the following work day.

C. **"Decree"** or **"Consent Decree"** means this Consent Decree, all exhibits attached to this Decree, including the Work Plan, and all modifications and amendments to this Decree made pursuant to the Sections XXI and XXII of this Decree ("entitled Modifications to Decree" and "Additional Work", respectively).

D. **"Effective Date"** shall mean the date of entry of this Decree by the Court.

E. **"National Contingency Plan"** or **"NCP"** shall mean the National Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and as amended from time to time.

F. **"Operation and Maintenance"** or **"O&M"** means long-term operation and maintenance of the remedial action including, but

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not limited to, performance of any monitoring program, as set forth in the ROD and detailed in the Work Plan.

G. "Party" shall mean a signatory to this Decree, specifically the United States and, individually or collectively, the Defendants.

H. "RCRA" shall mean the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6901 et seq.

I. "Record of Decision" or "ROD" means the EPA Record of Decision documenting the selection of the remedy and the contingency remedy for the first Operable Unit at the Site, issued on November 22, 1989, attached hereto and incorporated herein as Exhibit 1, and any amendments thereto.

J. "Remediation Levels" shall mean the prescribed standards, cleanup goals and levels as described in the ROD, as further specified in the Work Plan, including those applicable or relevant and appropriate hazardous substance concentration levels and other risk-based levels that indicate the degree of cleanup to be achieved in the ground water, soil, sediments and other media at and near the Site.

K. "Site" means the East Helena Smelter Site, as proposed for placement on the National Priorities List in September, 1984, those additional areas where hazardous substances released at or from the Site have come to be located, the areal extent of those releases and locations, and all areas in close proximity to, but not necessarily contiguous with, the areas described above

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determined by EPA to be necessary for implementation of the Work required in this Decree. The term "on-site" shall refer to the locations and areas described in this paragraph.

L. "State" means the State of Montana acting through the Montana Department of Health and Environmental Sciences.

M. "United States" means the United States of America and its departments and agencies, including EPA.

N. "Work" shall mean all those activities required by this Decree, including all activities in any way related to the performance of such activities, and including any additional work as may be required by EPA pursuant to this Decree.

O. "Work Plan" means the plan for implementation of the remedy at the Site, attached hereto and incorporated herein as Exhibit 2, including any modifications or amendments thereto made pursuant to the Sections of this Decree entitled "Modifications to Decree" and "Additional Work", and any approved plans and schedules required by said Plan and its modifications and amendments.

IV. GENERAL PROVISIONS

A. The purpose and intent of the Parties entering into this Decree are to pay past response costs and to ensure successful performance of the selected and, if necessary, the contingency remedy, consistent with the ROD and subject to the Work Plan, attached hereto as Exhibits 1 and 2, respectively, to abate the releases and threats of releases of hazardous substances at and from the Site.

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B. The Defendants shall finance and perform, at their own expense, all activities necessary to comply with the terms and conditions of this Decree and to implement the Work required herein, in accordance with the schedules set forth in the Work Plan and this Decree. The Defendants shall perform the Work set forth in the Work Plan in accordance with the provisions of this Decree.

C. All activities undertaken by the Defendants in connection with this Decree shall be consistent with the ROD, and shall be performed in accordance with the requirements of all applicable or relevant and appropriate federal and State laws and regulations ("ARARs"), or amendments thereto, as identified in the ROD. If the ARARs change during the course of Work, the Defendants shall be responsible for attaining any additional or more stringent ARARs.

D. Defendants shall achieve all Remediation Levels specified in the ROD and in the Work Plan for the soils, sediments, surface water, air, and ground water media at the Site. Defendants shall achieve all Remediation Levels specified in the ROD and in the Work Plan and shall perform all work necessary to achieve those Remediation Levels. In the event that Remediation Levels for a particular media or material, for any hazardous substance, are specified in both the ROD and in the Work Plan, and such levels differ, Defendants shall achieve the more stringent of the two levels.

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E. Defendants agree to reimburse the United States for its response costs as provided in Section XIII of this Decree.

F. The Court finds and the Parties agree that this Decree, the Record of Decision, and the Work Plan, and all Work, Remedial Actions, Remedial Designs, Remedies, and Response Actions required and specified therein are not inconsistent with the National Contingency Plan.

G. This Decree is not, nor shall it act as, nor is it intended by the Parties to be, a permit issued pursuant to federal or State statute or regulation.

V.
PERFORMANCE OF WORK

A. All activities carried out at the Site, including all Work required by the Work Plan, are subject to prior approval by, and oversight by EPA.

B. All plans, reports and other documents required by the Work Plan shall be subject to review, modification, and approval by EPA. In the event of any disapproval by EPA, EPA shall so notify the Defendants and specify any deficiencies and required modifications to such documents. Unless otherwise specified in the notice of disapproval, the Defendants shall, within 21 days of receipt of the EPA notice of disapproval, submit a revised document correcting the deficiencies and incorporating all of EPA's modifications. If the Defendants disagree with one or more of the deficiencies or modifications specified in the notice of disapproval, they shall meet with EPA to discuss their

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disagreement within 14 days of receipt of EPA's notice of disapproval. If the disagreement is not resolved, the Defendants shall request dispute resolution under this Decree within this same 14-day period. For those modifications and deficiencies specified by EPA and not disputed by Defendants, Defendants shall submit, within the time frame specified by EPA in its notice of disapproval or, if not specified in such notice, within 21 days of receipt of the notice of disapproval, a revised document, plan, or report incorporating all such modifications and addressing all such deficiencies not in dispute. At the time a revised document is submitted to EPA, the Defendants shall submit a cover letter describing their response to each modification and deficiency specified in the notice of disapproval, and a certification that no other changes were made other than those required by EPA.

C. Pursuant to Section XV of this Decree, the Defendants shall be liable for stipulated penalties from the date that EPA provides notice that any revised documents submitted by Defendants do not correct the deficiencies or make the modifications required by EPA until the date that the deficiencies are corrected or the modifications are made.

D. Except as otherwise specifically provided in this Decree, upon entry of this Decree, the Defendants shall commence implementation of the Work set forth in the Work Plan. Except in accordance with the Work Plan and, unless otherwise directed by EPA, the Defendants shall not commence any on-site construction

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or clean-up activities or any Work described as Remedial Action in the Work Plan until EPA approves any necessary plans and schedules or otherwise authorizes the Defendants to proceed with such Work. Commencement of such Work without the express approval of EPA is a violation of this Decree which will subject the Defendants to stipulated penalties as provided in Section XV of this Decree.

E. As specified in the Work Plan, certain Remedial Design activities will be performed by Defendants before entry of this Decree by the Court. The fact that Defendants have begun Remedial Design activities does not alter the United States' rights to propose modifications to the Consent Decree or reject the Consent Decree prior to its entry by the Court after receipt of public comment. Following entry of the Decree by this Court, all Remedial Design obligations may be enforced by the United States retroactively, pursuant to this Decree. Remedial Design Work, whether performed before or after entry of this Decree, shall occur in accordance with the schedule set forth in the Work Plan.

F. In the event EPA determines that the Defendants have failed to implement all or a portion of the Work required under this Decree according to the schedules contained herein, including, but not limited to, the timely submission of plans and work proposals, EPA may either perform any or all portions of the Work that remains incomplete or any supporting actions necessary to complete such Work, or may seek enforcement of this Decree by

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the Court, including the assessment of stipulated penalty invoke the provisions of Section XXII of this Decree. Nothing in this Section shall limit the authority of EPA's Project Coordinator, as provided in Section VIII of this Decree.

G. The Parties acknowledge and agree that neither this Decree, nor the Work Plan, nor any EPA approval pursuant to this Decree, constitutes a warranty or representation of any kind by the United States that the Work required under those plans and documents will achieve Remediation Levels, and the Parties further acknowledge and agree that nothing in this Decree, Work Plan, or any EPA approval pursuant to this Decree shall foreclose or limit in any way the United States from seeking performance of all terms and conditions of this Decree. Nothing in this Decree shall be construed to relieve Defendants of their obligation to achieve all Remediation Levels, as provided in this Decree.

VI.

COMPLIANCE WITH FEDERAL AND STATE REQUIREMENTS

A. The activities conducted and all Work performed pursuant to this Decree shall be conducted and completed in accordance with CERCLA, the NCP, EPA guidance, and any amendments or modifications to CERCLA, the NCP, or EPA guidance which occur during implementation of Work. The activities conducted and all Work performed pursuant to this Decree shall be conducted in accordance with the standards, criteria, specifications,

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requirements, and schedules set forth in this Decree. Where standards, criteria, specifications, and requirements are not set forth in this Decree or otherwise addressed by CERCLA, the NCP, or EPA guidance, the Defendants shall be responsible for identifying and using other guidelines, policies, procedures, and information that may be appropriate for performing the Work and shall notify EPA of such guidelines, policies, procedures, and information in the appropriate work proposal which shall be subject to EPA approval.

B. Activities undertaken by Defendants shall be in compliance with all other federal, state, and local laws and regulations, including permit requirements, unless an exemption from such permit requirement is provided by Section 121(e) of CERCLA, 42 U.S.C. § 9621(e). The Defendants shall identify and obtain all permits, licenses, and approvals required for performance of the Work in sufficient time to perform Work as scheduled.

C. The Defendants shall assist EPA in the consultation process described in 36 C.F.R. Part 800 to develop methods to avoid or reduce adverse effects on identified historical resources. The Defendants shall implement all mitigation measures identified by EPA through the consultation process.

D. The Defendants shall employ sound scientific, engineering, and construction practices in performing the Work pursuant to this Decree. All tasks performed shall be under the direction and supervision of qualified Contractors or personnel

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with experience in the types of tasks required for implementation of the Work. Each Contractor and all personnel shall be qualified to conduct those portions of the Work for which it is retained. On or before the effective date of this Decree, the Defendants shall notify EPA in writing of the name, title, and qualifications of each proposed Contractor to be used in carrying out the Work. The Defendants shall further demonstrate to EPA that each Contractor possesses the qualifications, experience, technical capability, and management capability necessary to perform the Work in a safe and timely manner consistent with the requirements of this Decree. If EPA disapproves of any Contractor, the Defendants shall within 14 days submit the name of another Contractor and the information outlined above. If EPA disapproves any resubmitted Contractor, the Defendants shall be subject to stipulated penalties pursuant to Section XV of this Decree. The Defendants shall amend this notice in writing not later than seven days prior to any change in Contractor. Selection of such new Contractors shall be subject to approval by EPA as set forth in this Paragraph.

E. The Defendants shall employ a full-time, on-site inspector during construction. The on-site inspector shall verify compliance with all environmental and technical requirements; review all daily reports and construction activities to verify that all Work complies with the EPA-approved design; note and resolve all discrepancies in such daily reports

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and construction activities immediately; and review and initiate the daily, weekly, and monthly reports described below.

VII.
REPORTING REQUIREMENTS

A. During the course of Work under this Decree the following reports shall be submitted to EPA and the State.

1. Monthly Progress Reports. The Defendants shall submit certified monthly progress reports containing the following information:

- a. A description of the actions taken toward achieving compliance with this Decree, including plans and actions completed during the reporting period;
- b. A description and estimate of the percentage of the Work completed, and an evaluation of any progress toward meeting Remediation Levels set forth in this Decree;
- c. A description of any activities that deviated from or were carried out in addition to those provided for in the Work Plan, which occurred during the reporting period;
- d. Summaries of significant findings pertaining to the Remedial Design or Remedial Action during the reporting period;
- e. Summaries of all changes made in the Remedial Design or Remedial Action during the previous month;
- f. A description of all unresolved problems or potential problems encountered during the reporting period that may cause a performance delay and a description of efforts made to mitigate those delays;
- g. Change orders, nonconformance reports, claims made, and actions taken to rectify problems;
- h. Changes in personnel during the reporting period;

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- i. Projected work for the next reporting period, including a schedule by week of design and construction activities for the next month; and
- j. Copies of inspection logs and results of all sampling and tests and all other data (including invalidated and validated analytical data on Contract Laboratory Program Form I's or in a similar format) including all data validation packages, as defined in the Quality Assurance Project Plan (QAPP), received or produced by the Defendants during the course of work during the previous month.

These reports shall be submitted to EPA and the State on or before the 10th day of each month after the date of entry of the Decree, and each month thereafter, until EPA accepts the constructed project as described in the Work Plan.

2. Daily and Weekly Construction Reports. During construction, the Defendants shall prepare daily and weekly reports on construction activities discussing, at a minimum, the daily activities, field adjustments, change orders, summaries of problems and actions to rectify problems, and such information as EPA may specify. The daily reports and the weekly report shall be compiled and delivered to EPA and the State each week.

3. Operation and Maintenance (O&M) Reports. During the Operation and Maintenance (O&M) phase of the Work, the Defendants shall prepare and submit ongoing O&M Reports to EPA and the State. These reports shall include, at a minimum, the following elements:

- a. A description of O&M activities performed during the reporting period;
- b. A description of the performance of each component of the Remedial Action, including a summary of all

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groundwater, surface water, sediment and soils monitoring data and their effectiveness in meeting the chemical-specific and action-specific ARARs identified in the ROD and the Remediation Levels set forth in the ROD;

- c. A description and summary of the results of all monitoring performed in connection with the remedy;
- d. Identification of any problems or potential problems and a description of all steps taken or to be taken to rectify the problems;
- e. An appendix containing all invalidated and validated data on Contract Laboratory Program Form I's or in a similar format collected during the reporting period; and
- f. Copies of any O&M training materials and a record of employee attendance at training sessions.

The O&M Reports shall be submitted on or before the 10th day of each month after the commencement of the O&M phase of the Work. The Defendants shall continue submitting O&M reports monthly for one year following the date of EPA acceptance of project construction. Thereafter, O&M Reports shall be submitted quarterly on or before the 10th day of January, April, July, and October, for the period defined in the Work Plan.

4. **Five-Year Review Reports.** The Defendants shall prepare and submit the five-year review reports described in the Work Plan to EPA, the Department of Justice, and the State. These Reports shall be due on the fifth anniversary of the effective date of the Decree and on the same date every five years thereafter.

B. All documents required to be submitted pursuant to this Decree shall be hand delivered or sent by first-class mail to the

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following persons or to such other persons as the parties hereafter may designate in writing:

- (1) Documents submitted to EPA shall be sent in triplicate to:
- (2) Documents submitted to the United States Department of Justice shall be sent to:

Remedial Project Manager
East Helena Smelter Site
U.S. Environmental Protection Agency
Region VIII, Montana Operations Office
Federal Building, Drawer 10096
301 South Park
Helena, Montana 59626-0026

East Helena Smelter Site
DOJ reference No. 90-11-2-563
U.S. Department of Justice
Environmental Enforcement Section
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

- (3) Documents to be submitted to the Defendants shall be sent to:

ASARCO

Jon C. Nickel
Industrial Quality Manager
ASARCO Incorporated
Box 1230
East Helena, Montana 59635
(406) 227-7160

Cynthia S. Leap, Esq.
Holland and Hart
P.O. Box 8749
Denver, Colorado 80201
(303) 295-8342

Anaconda

Robert Dent
Manager, Western Minerals Projects
Anaconda Minerals Co.
555 17th Street
Denver, Colorado 80202

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Jeff Desautels, Esq.
Legal Department
Anaconda Minerals Co.
555 17th Street
Denver, Colorado 80202

- (4) Documents submitted either to EPA or the Defendants shall also be submitted in triplicate to:

Project Manager
East Helena Smelter Site
Department of Health and Environmental Sciences
Solid and Hazardous Waste Bureau, Cogswell Building
Helena, Montana 59620

C. Upon the occurrence of any event during performance of the Work which, pursuant to Section 103 of CERCLA, 42 U.S.C. § 9603, requires reporting to the National Response Center, the Defendants shall promptly notify orally the Project Coordinators for EPA and the State in addition to providing any other notification required by law. In the event of the unavailability of the EPA Project Coordinator, the Defendants shall notify the Emergency Response Branch of EPA, Region VIII, in addition to the reporting required by Section 103 of CERCLA. Within seven days of the onset of such an event, the Defendants shall furnish to EPA and the State a written report setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within 30 days of the conclusion of such an event, the Defendants shall submit a report setting forth all actions taken to respond thereto and any known residual effects of the event.

D. All reports submitted to the United States pursuant to this Decree shall contain the following statement which shall be signed by a responsible corporate officer of the Defendants:

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"I certify that the information contained in or accompanying this (submission) is true, accurate, and complete. As to (the) (those) identified portion(s) of this (submission) (document) for which I cannot personally verify (its) (their) truth and accuracy, I certify as the company official having supervisory responsibility for the person(s) who, acting under my direct instructions, made the verification that this information is true, accurate, and complete." The term "responsible corporate officer" means (a) a president, secretary, treasurer or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decisionmaking functions for the corporation, or (b) the manager of one or more manufacturing, production, or operating facilities, if the authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

VIII.
PROJECT COORDINATORS

A. On or before the effective date of this Decree, EPA and, collectively, the Defendants shall each designate one technical Project Coordinator and shall notify one another in writing of the name, title, affiliation, address, and telephone number of their respective Project Coordinators. Each Project Coordinator shall be responsible for overseeing implementation of this Decree. An Alternate Project Coordinator may be designated to receive communications if the Project Coordinator is unavailable.

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B. To the maximum extent possible, all communications concerning technical aspects of this Decree shall be coordinated through the Project Coordinators. The Parties understand that the State will also designate a Project Coordinator. All coordination with the State will, to the maximum extent possible, be accomplished through the State Project Coordinator.

C. Each party is entitled to replace its Project Coordinator or Alternate Project Coordinator by notifying the other Project Coordinators in writing of the replacement's name, title, affiliation, address, and telephone number not later than five days prior to the effective date of replacement.

D. EPA shall be the lead agency for implementation of Work under the Work Plan. The EPA Project Coordinator shall have the authority vested in the On-Scene Coordinator and the Remedial Project Manager under the NCP. This authority includes, but is not limited to, power to halt, conduct, or direct work pursuant to this Decree and to initiate response actions. The EPA Project Coordinator may halt the Work including, but not limited to that inconsistent with the NCP, the ROD, this Decree, or the Work Plan, and any activity that has not been approved by EPA. The absence of the EPA or any other Project Coordinator from the Site shall not be a cause for stoppage of Work.

E. The Defendants' Project Coordinator shall be responsible for directing the day-to-day activities of the Defendants and any Contractors retained by them to perform the Work pursuant to this

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Decree, in compliance with all the terms and conditions of this Decree.

IX.
SITE ACCESS AND SAMPLING

A. Access and entry at all times during the implementation of this Decree to the portions of the Site owned by the Defendants is hereby ORDERED by the Court and granted to the United States and its authorized representatives, including, but not limited to, contractors of the United States, for purposes of effectuating and monitoring all terms of this Decree.

B. To the extent that access to or easements over property other than property owned by the Defendants is required for the proper and complete performance of this Decree, the following procedures shall be used:

1. The Defendants shall use their best efforts to obtain written access agreements, rights-of-way, or easements for access to such property. Access agreements are appropriate for short-term entry; for long-term monitoring and operation and maintenance, rights-of-way or easements shall be obtained. Such agreements, rights-of-way, or easements shall ensure access for the United States and its authorized representatives and shall run with the land. Defendants shall obtain access agreements, rights-of-way, or easements no later than 30 days prior to the time that access to particular property is first needed. If the Defendants are unable to obtain access within that time frame, they shall, no later than 24 days prior to the time access to the

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property is needed, notify EPA in writing of their failure to obtain access and the efforts made to obtain it.

2. Although such action is not required by the terms of this Decree, in the event that the United States does act to assist the Defendants in obtaining access, the Defendants shall reimburse the United States for its costs incurred in such action, pursuant to Section XIII of this Decree.

C. Notwithstanding any provision of this Decree, the United States retains all of its respective access authorities and rights under any applicable statute, regulation, or permit.

D. The Defendants hereby consent to oversight of the Work performed pursuant to this Decree by EPA and its authorized representatives. Oversight activities include, but are not limited to, inspecting records, operating logs, and contracts; conducting tests, inspections, and sampling; using a camera, sound recording equipment, or other documentary-type equipment; verifying the Work performed and data collected by the Defendants; and otherwise reviewing the conduct of the Defendants in carrying out the terms of this Decree.

E. At all times, EPA shall have the right to take samples at the Site. EPA shall provide notice of sampling activities to Defendants, and Defendants shall be allowed to take split or duplicate samples in conjunction with any sampling activities performed by EPA to oversee the Work undertaken by Defendants, if Defendants so request. Upon request by Defendants, verified results of any EPA sampling activities performed by EPA to

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oversee the Work undertaken by Defendants shall be provided to Defendants in accordance with applicable law or regulation. Analytical results obtained by EPA shall be released to the Defendants only after EPA completes a quality assurance/quality control ("QA/QC") review and determines that the data is verified according to EPA procedures.

F. The Defendants shall provide EPA written notice at least 14 days prior to collecting samples pursuant to this Decree. Upon request, the Defendants shall allow EPA or its authorized representatives, including contractors, to take split or duplicate samples. The Defendants shall make available to EPA through their monthly written progress and operation and maintenance reports the results of all sampling, tests, or other data (in both raw and interpreted formats) generated with respect to the implementation of the Work Plan.

G. When sampling and analyzing samples, Defendants shall use quality assurance/quality control and chain of custody procedures in accordance with EPA's "Interim Guidelines and Specifications for Preparing Quality Assurance Project Plans" (QAM-005/80) and any other pertinent EPA guidance. These requirements shall be incorporated in the Quality Assurance Project Plan (QAPP) required to be prepared and submitted by Defendants pursuant to the Work Plan. The Defendants shall ensure that EPA and its authorized representatives are allowed access to any laboratory utilized by Defendants in implementing this Decree. Such laboratories shall perform analyses according

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to EPA methods or other methods deemed satisfactory to EPA, as specified in the QAPP. If a non-EPA method is proposed, the Defendants shall submit all protocols to be used for analysis to EPA at least 60 days prior to the commencement of analyses and shall obtain EPA's written approval prior to use of the protocol. Defendants shall submit to EPA data packages containing the same type of information and presented in the same form as those employed by the EPA Contract Laboratory Program. The Defendants shall also ensure that the laboratories utilized by Defendants participate in a QA/QC program equivalent to that which is followed by EPA. In addition, upon request, the Defendants shall have such laboratory analyze any samples that may be submitted by EPA for quality-assurance monitoring.

H. The Defendants shall:

1. Conduct a periodic audit of any laboratory that will analyze samples under this Decree during the time the laboratory is conducting analyses, as specified in the Sampling and Analysis Plan. Such audit will be conducted to verify analytical capability and QA/QC procedures. Audit reports must be submitted to the EPA Project Coordinator within 15 days of completion of the audit. Corrective actions identified in such audit and approved by EPA shall be taken immediately. The Defendants must also report serious deficiencies identified in such audit to EPA within 24 hours of the time the Defendants learn of the deficiency, and, within 5 days of time the Defendants learn of

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such serious deficiencies, shall submit to EPA a written report of such deficiencies.

2. Conduct at least one field audit per year during sampling activities to verify that field samplers are correctly following sampling procedures described in the Sampling and Analysis Plan. Corrective actions identified in such audit and approved by EPA shall be taken immediately to correct any deficiencies. Defendants must also report serious deficiencies identified in such audit to EPA within 24 hours of the time Defendants learn of the deficiency and, within 5 days of the time Defendants learn of such serious deficiencies, shall submit to EPA a written report of such deficiencies.

3. Provide data validation of analyses done by any laboratory used. This data validation shall determine data utility and shall be performed in accordance with the Functional Guidelines for Evaluating Organics (Inorganics) Data, August, 1985, and July 1, 1988, Revision (Viar Company), for data derived by Contract Laboratory Program methods. If another method is used, the data validation shall be performed in accordance with the QA/QC data validation criteria set forth in that method. For methods lacking QA/QC data validation protocols, the Defendants must establish validation criteria such as those in Section 8 of the EPA Series Methods in 40 C.F.R. Part 136. The appropriate quality assurance data validation summary reports shall be submitted, along with sample data and summary sheets, to the EPA

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Project Coordinator at the time final sample results are provided to EPA.

X.
DOCUMENTATION, AVAILABILITY OF INFORMATION,
AND RECORD RETENTION

A. The Defendants shall maintain documentation relating to all Work performed under this Decree. The Defendants shall retain all records and documents related to this Consent Decree and shall establish a document control system which shall ensure the preservation of all data and supporting documentation and which shall have the following objectives:

1. Creation of a central file containing all documents pertaining to Work under this Decree;
2. Organization of the documents to facilitate retrieval of information; and
3. Establishment of procedures to ensure that all documents are routinely placed in the central file.

B. In addition, the Defendants shall prepare and update on a six month basis an inventory of all documents contained in the central file. The inventory shall contain for each document (1) the document date, (2) the author(s) including title and affiliation, (3) the recipient(s) including title and affiliation, (4) the document title or subject, (5) a summary of its contents, and (6) the number of pages. The Defendants shall submit the document inventory to EPA during the first week of every six month period during the period of performance under this Decree. The Defendants shall provide EPA with copies of documents upon request, in accordance with the schedule provided by EPA to Defendants in any such request.

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C. The Defendants shall establish special procedures with respect to management of all data collected under this Decree. The Defendants shall maintain, in an organized filing system, the following documents, including:

1. All field measurements, logbooks, and notebooks;
2. Laboratory records including, but not limited to, laboratory purge files, sample tags, chain-of-custody records, copies of sample tracking records, analysts' logbook pages, instrument logbook pages (including instrument conditions), bench sheets, instrument readout records, computer printouts, chromatographic charts, raw data summaries, correspondence, memoranda, and document inventory;
3. Data validation reports; and
4. All test results of construction testing.

D. The Defendants shall also use an automated data management system to facilitate standardization of reporting and evaluation of data. This system shall be designed to prevent the introduction of errors or the loss or misinterpretation of data.

E. For the period during which this Decree is in effect, the Defendants shall permit EPA and its authorized representatives to inspect and copy all records, files, maps, and other documents, writings, or depictions pertaining to implementation of this Decree.

F. All data, factual information, and documents submitted by the Defendants to EPA pursuant to this Decree shall be subject to public inspection unless identified as confidential business information when submitted to EPA by the Defendants and determined by EPA to be such, in conformance with 40 C.F.R. Part

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2 and 42 U.S.C. § 9604(e)(7). The data, factual information, and documents so determined by EPA to be confidential business information will be disclosed by EPA only in accordance with applicable EPA regulations governing confidentiality. The Defendants shall not assert confidentiality regarding any hydrogeological or chemical data, data submitted in support of a remedial proposal, or any other scientific or engineering test data.

G. The Defendants shall preserve for a minimum of six years after the United States determines that the remedial action has been completed pursuant to Section XXIV, all records and documents in its possession or in the possession of its divisions, employees, agents, Contractors, or attorneys which relate in any way to this Decree or Work performed pursuant to this Decree, notwithstanding any document retention policy Defendants may institute to the contrary; provided, however, that within this period, subject to EPA request, the Defendants may forward all such documents to EPA and thereby satisfy the requirements of this provision. At the end of the six-year period and prior to any destruction, Defendants shall notify in writing the EPA and the United States Department of Justice and shall give those agencies 60 days in which to request an opportunity to inspect and copy all such records and documents. Defendants shall pay all costs associated with copying such records requested by the United States.

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H. The Defendants shall cooperate with EPA in providing information to the public. As requested by EPA, the Defendants shall participate in the preparation of information to be disseminated to the public and in public meetings which may be held or sponsored by EPA concerning Work under this Decree.

XI.
INSURANCE

A. The Defendants shall obtain and maintain in force, and shall require each of their Contractors performing Work pursuant to this Decree to obtain and maintain in force, insurance policies to protect the United States against all liability arising out of the acts and omissions of the Defendants or their Contractors in amounts not less than those specified below:

1. For those workers directly involved in the performance of Work pursuant to this Decree, Workers' Compensation and Employer's Liability Insurance in accordance with the laws of the State of Montana;

2. For Work performed pursuant to this Decree, Comprehensive General Liability Insurance, including Contractual Liability:

- Bodily Injury Liability, including sudden and non-sudden occurrences: \$10,000,000 each occurrence, \$20,000,000 annual aggregate;
 - Property Damage Liability, including sudden and non-sudden occurrences: \$10,000,000 each occurrence, \$20,000,000 annual aggregate;
3. Automobile Liability Insurance:
- Bodily Injury Liability: \$500,000 each person, \$1,000,000 each occurrence,

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- Property Damage Liability: \$500,000 each occurrence;

4. Umbrella insurance coverage for each Defendant in the amount of \$10,000,000 which shall provide coverage in excess of the underlying coverages described above.

5. As to each Contractor for a Defendant, umbrella insurance coverage in the amount of \$10,000,000 which shall provide coverage in excess of the underlying coverage described above.

B. EPA reserves the right to increase the dollar amounts of the insurance requirements specified above in paragraph A of this Section if the degree or duration of risk increases to such a level that EPA determines insufficient to cover potential claims. Within 60 days of receipt of written notification by Defendants from EPA of such determination, Defendants shall certify in writing to EPA that the additional insurance coverages have been obtained, and shall provide to EPA a copy of all amended or additional insurance policies and certificates of insurance attesting that the required coverages are in full force and effect.

C. Before commencing work pursuant to this Decree, or 30 days after the effective date of this Decree, whichever is sooner, and no later than 14 days prior to any change in Contractor, the Defendants shall certify in writing that the insurance coverages required by this Decree have been obtained and shall provide to the EPA Project Coordinator a copy of all insurance policies obtained and certificates of insurance

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attesting that the required coverages are in full force and effect.

XII.
FINANCIAL ASSURANCE

A. On or before the effective date of this Decree, the Defendants shall establish and shall thereafter maintain a financial instrument sufficiently funded to perform the Work, including Operation and Maintenance. The instrument shall be fully funded and in full force and effect on or before the effective date of this Decree. Defendants shall submit to EPA a copy of the signed and executed instrument within 21 days of execution of the instrument.

B. The Defendants shall review the financial instrument periodically to determine whether it is funded sufficiently to cover performance of the remaining Work and other obligations under this Decree. If at any time the net worth of the financial instrument is insufficient to perform the remaining Work and other obligations under this Decree, the Defendants shall provide written notice to EPA within seven days after the net worth of the financial instrument becomes insufficient. The written notice shall describe what actions have been or will be taken to fund the instrument adequately.

C. The Defendants shall on a quarterly basis prepare and submit to EPA, beginning 90 days following the effective date of this Decree, a budget report that identifies expenditures and all cost overruns that occurred during the prior quarter and

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expenditures and cost overruns anticipated during the upcoming quarter in relation to the Work to be performed by the Defendants under this Decree. Budget reports must demonstrate the adequacy of funds available in relation to the remaining Work and other obligations required under this Decree.

XIII.
REIMBURSEMENT OF RESPONSE COSTS

A. On or before the effective date of this Decree, the Defendants shall pay \$ _____ to the United States as reimbursement of past response costs incurred by the United States with respect to the Site as of _____, 19 ____.

B. After the end of each calendar year in which this Decree is in effect, EPA shall submit to the Defendants an accounting of response costs incurred by the United States in connection with this Decree during that calendar year. Such costs shall include, but not be limited to, all direct and indirect response costs incurred by the United States. The accounting for the first year after the effective date of this Decree shall include all costs incurred by the United States prior to the effective date of this Decree that were not included with or reimbursed as past response costs under Paragraph A of this Section. Within 30 days of receipt by Defendant of each accounting from EPA, the Defendants shall reimburse the United States for all response costs set forth in the accounting.

C. The accounting described in Paragraph B shall consist of a cost summary containing the following: a copy of the EPA SPUR

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report (or its equivalent) and any additional summary information determined necessary by EPA to identify costs not included in the SPUR report. Defendants expressly waive the right to request additional documentation.

D. If Defendants determine that the United States has made an accounting error or has incurred a cost that is inconsistent with CERCLA, the Defendants may contest payment of any amount under Paragraph B of this Section by initiating Dispute Resolution under Section XIV of this Decree before payment is due. The written request for Dispute Resolution shall specifically identify the contested costs and provide a detailed explanation of the basis for the objection. In the Dispute Resolution process, the Defendants bear the burden of proving that an accounting error has been made or that costs incurred are inconsistent with CERCLA.

E. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, the Defendants, on or before the due date, shall pay the full amount of the contested costs into an escrow account in a bank duly chartered in the State. The Defendants shall simultaneously transmit a copy of the check to the EPA Project Coordinator. If the Defendants subsequently prevail in all or part of the dispute, the Defendants may withdraw from the escrow account the amount upon which they prevailed in the dispute. If the Defendants do not prevail in all or part of the dispute, the full amount owed

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to EPA shall be withdrawn from the escrow account and this amount, plus interest calculated in accordance with paragraph G of this section, shall be transmitted to EPA within three days after the completion of dispute resolution.

F. For all payments under this section, the Defendants shall remit a certified or cashier's check, made payable to the "Hazardous Substances Superfund," to the following address:

EPA Region VIII
Attn: Superfund Accounting
Post Office Box 360859M
Pittsburgh, Pennsylvania 15251

or such other address as EPA may designate in writing. Payments must be designated as "Response Costs--East Helena Smelter Site" and shall reference the Respondent's name and address, EPA Site Account Number: 8T30, and the Civil Action Number of this Decree. Copies of the transmittal letter and check shall be sent to the EPA Project Coordinator and to the Department of Justice at the time of payment.

G. If payment of any costs under this Section is not received by EPA when payment is due, interest shall accrue from the date of the initial demand for the costs specified in Paragraph A of this Section, and from the date of transmittal by EPA to the Defendants of the accounting for the costs specified in paragraph B of this Section. Interest shall accrue on the unpaid balance until such costs and accrued interest have been paid in full. The interest rate shall be the rate specified for interest on investments of the Hazardous Substances Superfund in

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Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). Interest will be compounded annually. On October 1 of each subsequent fiscal year, any unpaid balance will continue to accrue interest at a new rate to be determined by the Secretary of the Treasury.

H. The United States reserves its rights to bring an action against the Defendants to enforce the cost reimbursement provisions of this Decree and seek penalties pursuant to Section 109 of CERCLA, 42 U.S.C. § 9609. EPA also reserves its rights to recover any past or future costs not reimbursed under this Decree. Defendants waive all rights to contest, on any basis, or to seek return of or reimbursement for, costs reimbursed to EPA by Defendants under this Section.

XIV. DISPUTE RESOLUTION

A. The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree and shall apply to all provisions of this Consent Decree.

B. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed thirty (30) days from the time the dispute arises, unless it is extended by agreement between Plaintiff and Defendant(s). The dispute shall be considered to have arisen when one party notifies the other parties in writing that there is a dispute. Upon completion of

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the period for informal negotiations, EPA shall provide a written statement of position on the disputed matter to Defendant(s).

C. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding paragraph, then the decision set forth in the statement of position advanced by EPA shall be considered binding unless, within 5 days after receipt of EPA's statement of position, Defendant(s) invoke the formal dispute resolution procedures of this Section by giving written notice to the United States. After receiving such notice from Defendant(s), EPA shall notify Defendant(s) whether the dispute is to be resolved on the administrative record under Paragraph D below. At its option EPA may determine, which determination shall not be reviewable by a court, that any dispute which relates to the selection, extent, or adequacy of any aspect of any response actions is to be resolved on an administrative record. For purposes of this paragraph, the adequacy of any response action includes: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this Consent Decree; and (2) the adequacy of response actions performed pursuant to this Consent Decree.

D. If EPA elects, pursuant to Paragraph C, to resolve a dispute on an administrative record, the following procedures shall apply:

1. The administrative record shall include the written notification of the dispute, all statements of position, and any

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other materials submitted by the parties pursuant to Paragraphs B and C in support of their positions.

2. Within 10 days after receiving notice from EPA that a dispute is subject to resolution on an administrative record, Defendant(s) shall serve on EPA a written statement of position on the matter in dispute, including any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon. Within 10 days after receipt of Defendant(s') statement of position, EPA may serve on Defendant(s) additional statements of position (in EPA's case, a "supplemental statement of position"), including supporting documentation, in response to Defendant(s') statement of position. These 10-day periods for exchange of statements of position may be shortened by EPA upon notice to all parties to the dispute.

3. Upon review of the administrative record, the Director of the Waste Management Division, EPA Region VIII, shall issue a final decision resolving the dispute.

4. Any decision by EPA pursuant to the preceding paragraph shall be reviewable by this Court, provided that a notice of judicial appeal is filed by the Defendant(s) within 10 days of receipt of EPA's decision.

E. If, pursuant to Paragraph C, EPA determines that a dispute should not be reviewed on an administrative record, then the position on the dispute advanced by EPA in its initial statement of position following informal negotiations under

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Paragraph B shall be considered binding on all Parties unless, within 10 days after receipt of EPA's determination that review will not be on the administrative record, Defendant(s) file a petition with this Court setting forth the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree.

F. In proceedings on any dispute relating to the Work, Defendant(s) shall have the burden of demonstrating that the position advanced by EPA is arbitrary and capricious or otherwise not in accordance with law. With respect to disputes for which an administrative record is developed pursuant to Paragraph D, judicial review of EPA's decision shall be confined to the administrative record. In proceedings on any dispute, Defendant(s) shall bear the burden of proof. Nothing herein shall prevent the United States from arguing that the Court should apply the arbitrary and capricious standard of review to disputes under this Consent other than those relating to the Work.

XV.
STIPULATED PENALTIES

A. The Defendants shall pay the sums set forth below as stipulated penalties for each day that one or more of the Defendants fails to comply with the terms and conditions of this Decree, unless EPA determines that such failure to comply is

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attributable to a force majeure as defined in Section XVI of this Decree. Compliance with the terms and conditions of this Decree shall include completion of a task or activity or compliance with any requirement under this Decree in a manner acceptable to EPA within the time frames set forth in or by virtue of this Decree. Noncompliance includes, but is not limited to: failure to hire qualified personnel to perform Work; performing Work without EPA approval; failure to achieve the Remediation Levels; violation of any ARAR or statute or regulation; failure to complete Work as scheduled or as prescribed in this Decree; failure to submit a document or report; failure to file reports when due; failure to revise documents in accordance with EPA instructions; and failure to provide notification of spills or other releases as specified herein. Penalties shall accrue in the following amounts:

<u>Period of Penalty per Failure to Comply</u>	<u>Violation per Day</u>
1st through 7th day	\$10,000
8th through 14th day	\$15,000
15th day and beyond	\$25,000

All stipulated penalties begin to accrue on the day that complete performance is due or noncompliance occurs and shall continue to accrue daily through the final day of correction of the noncompliance, as determined by EPA. Payment of penalties shall not alter in any way the Defendants' obligation to complete performance, and nothing herein shall prevent simultaneous accrual of separate penalties for separate instances of noncompliance with this Decree.

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B. All penalties owed to the United States under this Section shall be payable within 30 days of receipt of notification of noncompliance by the Defendants from the United States unless the Defendants invoke the Dispute Resolution provisions of Section XIV of this Decree within such 30-day period. Penalties shall accrue from the first day of violation, regardless of when EPA has notified the Defendants of a violation. Interest shall begin to accrue on the unpaid balance at the end of the 30-day period.

C. Stipulated penalties under this Section shall be paid by certified or cashier's check payable to the "Hazardous Substances Superfund" and shall be remitted to:

EPA Region VIII
Attn: Superfund Accounting
Post Office Box 360859M
Pittsburgh, Pennsylvania 15251

Payment shall be identified as "Stipulated Penalties -- East Helena Smelter Site" and shall reference the payee's name and address, "Site Number 8T30," and the Civil Action Number of this case. A copy of the check shall be sent to the EPA Project Coordinator and to the Department of Justice at the time of payment.

D. Should Defendants dispute the amount of stipulated penalties by invoking the Dispute Resolution provisions of Section XIV, they shall have the burden of establishing that they were in compliance with the terms and conditions of this Decree for the period in dispute on the administrative record before the

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Agency and that the Agency's position on the disputed issue is arbitrary and capricious or otherwise not in accordance with law. If the Court resolves the dispute in favor of the United States, the Defendants shall be liable for all stipulated penalties from the first day of noncompliance until such time as the violation is corrected.

E. If penalties are not paid within 30 days, interest shall accrue on any penalty amounts overdue at a rate as set forth in 42 U.S.C. § 9607 for any period after the receipt of notification of noncompliance. In addition, a handling charge will be assessed every 30 days during which penalties are overdue, and a six percent per annum penalty charge will be assessed.

F. No payments under this Section will be tax deductible.

G. The stipulated penalties set forth above shall be in addition to any other remedies or sanctions which may be available to the United States including, but not limited to, an action pursuant to Section 109 of CERCLA, 42 U.S.C. § 9609, by reason of the Defendants' failure to comply with the requirements of this Decree. Payment of stipulated penalties shall not be construed to impair or affect the authority of the Court to order compliance with the specific terms of this Decree.

XVI.
FORCE MAJEURE

A. A "force majeure" for purposes of this Decree is defined as any event arising from causes beyond the control of the Defendants or their Contractor(s) which delays or prevents the

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performance of any obligation under this Decree. The Defendants shall undertake all reasonable efforts to avoid or minimize such delay. Force majeure shall not include normal inclement weather, increased costs or expenses of performance, nor the financial inability of the Defendants to perform such Work. Force majeure shall not include the failure to obtain necessary approvals or permits if the Defendants failed to make complete and timely applications for such approvals.

B. When circumstances are occurring or have occurred which may delay or prevent the completion of any task(s) required under this Decree or which may delay obtaining access to any property on which any part of the Work is to be performed, whether or not such circumstances are due to a force majeure, the Defendants shall notify the EPA and the State Project Coordinators by telephone within 24 hours of the time the Defendants learn of the circumstances. In the event of the unavailability of the EPA Project Coordinator, the Defendants shall notify the Director of the Hazardous Waste Management Division of the EPA Region VIII. The Defendants shall also, within seven days of such event, supply to the EPA and the State Project Coordinators a written explanation of the reason for the delay, the anticipated duration of such delay, the measures taken and to be taken by the Defendants to prevent or minimize the delay, the timetable for implementation of such measures, and a statement as to whether in the opinion of the Defendants such delay may cause or contribute to an endangerment to public health or welfare or

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the environment. Failure to so notify the EPA Project Coordinator shall constitute a waiver of any claim of force majeure with respect to the circumstances causing such delay.

C. If the United States agrees that a delay is or was attributable to a force majeure, the parties shall modify the schedule contained in the Work Plan in accordance with the procedures described in Section XXI of this Decree to provide such additional time as may be necessary to allow the completion of the specific required task and any succeeding required task(s) affected by such delay, not to exceed the actual duration of the delay.

D. If the United States and the Defendants cannot agree whether the reason for the delay was a force majeure or whether the length of the delay was appropriate, Defendants shall invoke the Dispute Resolution provisions of Section XIV of this Decree. The Defendants shall have the burden of proving on the administrative record before the Agency that the Agency's determination regarding the existence of a force majeure was arbitrary and capricious or otherwise not in accordance with law and that the duration of the delay is or was warranted under the circumstances, and that the Defendants complied with the notice requirements of paragraph B of this Section.

XVII.
RESTRICTIONS ON CONVEYANCE

A. Within 30 days of entry of this Decree, the Defendants shall record a certification of entry of this Decree with the

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Recorder's Office, Lewis and Clark County, Montana, and shall record such certifications for all property of Defendants which is or may be subject to this Decree and shall execute the legal instruments and documents that are required to effectuate such recording. Defendants shall ensure that notice of this recording shall be sent to EPA.

B. Property owned by Defendants at the Site which will or may be affected by the performance of Work pursuant to this Decree may be freely alienated provided that at least 60 days prior to the date of such alienation, the Defendants notify the EPA of such proposed alienation, the name of the grantee, and a description of Defendants' obligations, if any, to be performed by the grantee.

C. Any deed, title, or other instrument of conveyance shall contain a notice that the property is subject to this Decree and shall set forth the style of the case, the case number, and the Court having jurisdiction herein.

D. The Defendants shall not convey any title, easement, or interest in such property, or any portion thereof, unless such conveyance includes a covenant running with the land that: (1) permits the United States and its authorized representatives to enter upon such property for purposes of effectuating, supervising, supporting, and monitoring all terms of this Decree; (2) contains an agreement not to interfere with or disturb the performance, supervision, and support of the Work, including Operation and Maintenance, monitoring, and post-closure

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activities conducted pursuant to this Decree; (3) contains an agreement to inform and bind any person or entity that subsequently acquires any title, easement, or other interest in such property, or any portion thereof, of the requirements, conditions, and operative effect of this Decree; and (4) contains a requirement that the purchaser exercise due care in not exacerbating any release from the property of a hazardous substance.

E. Any conveyance shall not include any language that may be construed to release the seller or purchaser from any CERCLA liability or from any obligations established under this Decree.

F. For each parcel of property owned by either Defendant on which hazardous substances will remain following remedial action at the Site, as specified in the ROD, Defendants shall record on the deed for such property a notification which states that:

(1) the property described in the deed has been used for the disposal of hazardous substances; (2) the property described in the deed may not be used in a manner inconsistent with the selected remedial alternative and O&M requirements for the property described in the Work Plan, and (3) a survey plot and record of the type and location of hazardous substances on such property and a survey plot and record describing each discrete disposal area located on such property, if such exists. This recording shall be filed in the appropriate county office for County. This recording shall occur within 30 days after completion of remediation for the contaminated areas or units is

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completed, as defined in the ROD and the Work Plan, or prior to any transfer described in this Section, whichever is earlier. Notice of the filing and a copy thereof shall be sent to EPA within 10 days of such filing.

XVIII.
ADMISSIBILITY OF DATA

A. Within 30 days from the date that any data is made available to Defendants by EPA, the Defendants shall review the data to determine whether the Defendants have any evidentiary objections to the data. If the Defendants do not submit a written objection to the data within this period, the Defendants shall be deemed to have waived any evidentiary objection to the data whether based on authenticity, foundation, hearsay, or other arguments.

B. The Defendants waive any evidentiary objection to the admissibility into evidence of data gathered, generated, or evaluated by EPA, or Defendants pursuant to this Decree that has been verified by the QA/QC procedures required by this Decree.

C. Sampling data that was gathered by EPA or Defendants during the Remedial Investigation/Feasibility Study activities leading to this Decree which has been verified by the QA/QC procedures established pursuant to the RI/FS process, as determined by EPA, shall be admissible as evidence without evidentiary objection as to foundation in any proceeding related to this Decree.

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D. For purposes of this Decree, "evidentiary objections" includes, without limitation, any objection based on the failure to offer testimony or evidence concerning collection and sampling procedures, chemical or physical analyses, chain of custody, field and laboratory QA/QC procedures, and any objection based on the failure to offer any sponsoring witnesses, including samplers and chemists and their assistants, and other persons in the chain of custody.

XIX.
INDEMNIFICATION

A. The United States shall not be liable for any injury or damages to persons or property resulting from acts or omissions of the Defendants or their Contractors in implementing Work under this Decree. The United States shall not be considered a party to any contract entered into by the Defendants to implement this Decree.

B. The Defendants agree to hold harmless and indemnify the United States from all claims which arise from the acts or omissions of the Defendants, their agents, contractors, consultants, and employees in carrying out the Work required by or undertaken pursuant to any provision of this Decree.

XX.
FIVE-YEAR REVIEW

A. Pursuant to Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), and any applicable regulations or guidance, EPA shall review Work performed in connection with the Site no less often

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than every five years after the initiation of the Work pursuant to this Decree to assure that human health and the environment are being protected by the remedial action being implemented.

B. If review pursuant to Paragraph A of this Section is completed prior to EPA's certification pursuant to Section XXV of this Decree (Certification of Completion) that the Work has been satisfactorily completed, then EPA shall notify the Defendants, in writing, of any determination that additional Work is necessary to meet Remediation Levels or is otherwise necessary to fulfill the objectives of this Decree. The provisions of Sections XXI and XXII of this Decree (Modifications To Decree and Additional Work, respectively) shall then apply. Nothing in this Paragraph shall affect in any way Defendants' obligations to perform and complete the Work required under this Decree.

C. If a review pursuant to Paragraph A of this Section is completed after EPA's certification of completion pursuant to Section XXV of this Decree, then the United States may take any actions pursuant to Sections 104, 106, or 107 of CERCLA, 42 U.S.C. §§ 9604, 9606, or 9607.

XXI.
MODIFICATIONS TO DECREE

A. No oral advice, guidance, suggestions, assurances, or comments by the United States or its authorized representatives shall modify the terms or conditions of this Decree or relieve the Defendants of their obligations under this Decree.

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B. This Decree may be modified or amended by mutual agreement of the United States and the Defendants. All modifications or amendments to this Decree shall be submitted to the Court for incorporation into this Decree consistent with the public comment procedures set forth in Section XXVIII of this Decree (Public Comment). All such modifications or amendments shall be in writing and shall take effect upon the date of entry by the Court.

C. If, following the effective date of this Decree, EPA determines that an amendment to the ROD is warranted, EPA may require and Defendants shall halt or modify the Work to provide for a public comment period and an amendment of the ROD. EPA will determine whether a ROD amendment and/or schedule change is necessary and what modifications in the Work or schedules are necessary. These determinations shall not be subject to dispute resolution.

XXII.

FAILURE TO MEET REMEDIATION LEVELS

A. In the event that EPA determines that a modification or amendment of the Work Plan is necessary to meet Remediation Levels specified in the ROD, EPA shall promptly notify the Defendants in writing of the changes in the Work required, changes in the schedule for implementation, if any, and a statement of reasons why such changes are necessary.

B. Upon receipt of the notice of EPA's determination that a modification or amendment to the Work Plan is necessary, the

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Defendants shall perform the modification or amendment to the Work Plan in accordance with the procedures set forth in Section V of this Decree (Performance of Work). If the Defendants disagree with EPA's determination, they shall request Dispute Resolution pursuant to Section XIV of this Decree within 14 days of receipt of EPA's written notification of the determination.

C. Upon receipt of EPA's notification of the need for the modification or amendment, if the Defendants agree with EPA's determination, the Defendants shall prepare a revision to the Work Plan adequate to accomplish the modification or amendment and a modification to the schedule, if necessary, for completion of such Work. The proposed Work Plan revision and schedule shall be submitted to EPA for review, modification, and approval as soon as possible, but in no event later than 30 days following written notification of the need for modification or amendment. Such submittal shall be subject to the procedures set forth in Section V of this Decree.

D. If EPA determines that any revision to the Work Plan resulting either from an agreement of the Parties, from EPA's independent determination, or from the Dispute Resolution process provided for in this Decree requires an Explanation of Significant Differences from the ROD, then notice and an explanation of such significant differences shall be lodged with the Court. Any determination by EPA concerning the Explanation of Significant Differences from the ROD is not subject to

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Dispute Resolution under this Decree. EPA determinations concerning implementation of the contingency remedy addressed in the ROD shall not be subject to the requirements of this Paragraph.

E. Requirements for implementing the contingency remedy are set forth in the ROD and in the Work Plan. If EPA determines the necessity for implementation of a contingency remedy addressed in the ROD or in the Work Plan, EPA shall promptly provide written notification to the Defendants specifying the reasons why such contingency remedy is necessary. Defendants shall perform the contingency remedy identified in EPA's notice. EPA's determination of the necessity for implementation of a contingency remedy shall not be subject to Dispute Resolution. If modifications or amendments to the Work Plan are required for implementation of the contingency remedy, EPA shall provide written notice of such to Defendants, and Defendants shall prepare and submit a revision to the Work Plan adequate to accomplish the Work required and a schedule for completion of such Work. Defendants proposed Work Plan revision for implementation of the contingency remedy shall be submitted to EPA for review, modification, and approval no later than 30 days following EPA's written notification. Such submittal shall be subject to the procedures set forth in Section V of this Decree.

F. Defendants may propose amendments or modifications to the Work Plan. EPA may consider any such proposed amendments and modifications and may, in its full discretion, reject or accept

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such proposals in part or in whole. EPA's consideration of, determination concerning, or failure to make any determination concerning any proposal by Defendants for to modify or amend this Work Plan shall not be subject to the Dispute Resolution provisions of this Decree, shall not excuse delay in any scheduled response action unless EPA agrees to an extension, and shall not stay the accrual of any stipulated penalties.

XXIII.
INTERPRETATION OF DECREE

A. All section headings herein are for convenience only and are in no way to be construed as part of this Decree or as a limitation on the scope of the provisions to which they may refer.

B. For the purposes of this Decree, time shall be computed in accordance with Rule 6 of the Federal Rules of Civil Procedure.

XXIV.
EFFECTIVE DATE, TERMINATION, AND SATISFACTION

A. This Decree shall be effective upon the date of its entry by the Court.

B. Upon EPA receipt of the Construction Completion Report described in the Work Plan, EPA shall review the Work and indicate its agreement or disagreement as to the completion of any task. All Work, including all Additional Work as required pursuant to Section XXII of this Decree, other than Operation and Maintenance, shall be deemed to have been completed when all

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tasks required by this Decree have been certified by EPA in writing in accordance with Section 122(f)(3) of CERCLA, 42 U.S.C. § 9622(f)(3), to have been completed satisfactorily.

C. If EPA concludes that the Work required has not been completed in accordance with the requirements set forth in this Decree, it shall notify the Defendants in writing of any deficiencies and what measures must be taken to complete specific tasks, referencing the specific portion(s) of the Decree or the Work Plan, as appropriate. Any dispute under this paragraph shall be subject to the Dispute Resolution provisions of Section XIV of this Decree.

D. When the Defendants believe that the actions required by this Decree have been completed, except for Operation and Maintenance, they shall, subject to the provisions of Paragraph B of this Section, petition the United States for agreement to terminate this Decree. This petition shall be filed with the Assistant Attorney General for Land and Natural Resources Division, United States Department of Justice, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530. If the United States accepts the petition, the United States and the Defendants shall jointly petition the Court for termination of the Decree. If the United States rejects the petition, it shall explain its reasons in writing, and the Dispute Resolution procedures of Section XIV of this Decree shall apply.

Termination shall not affect any requirements of this Decree pertaining to Operation and Maintenance, nor shall it

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affect the provisions of Sections VI(C), VII(A), IX, X, XII, XIII, XV, XVII, XIX, XX, and XXVII.

XXV.
CERTIFICATION OF COMPLETION

Within 90 days after Defendants conclude that the Work required pursuant to this Decree and as identified in the Work Plan has been fully performed, Defendants shall so notify EPA by submitting a written report by a registered professional engineer certifying that the Work has been fully performed in accordance with the requirements of this Decree. EPA intends to respond in a reasonable period of time to such notification and to independently perform inspections to verify this notification. If EPA determines that the Work or any portion thereof has not been completed in accordance with this Decree, EPA shall notify Defendants in writing of the activities which must be performed to complete the Work in accordance with the requirements of this Decree and shall set forth a schedule for performance of such activities. If EPA determines that the Work performed by Defendants does not satisfy the requirements of this Decree, EPA shall notify Defendants in writing, and Defendants shall complete any Work required by the Work Plan that has not been completed as specified by EPA and shall undertake all Additional Work required by EPA pursuant to Section XXII of this Decree (Additional Work). EPA shall issue a certificate of completion only after the Work, including all Additional Work, has been performed to the satisfaction of EPA. Uncompleted Work and Work performed by

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Defendants that does not satisfy the requirements of this Decree shall be subject to Stipulated Penalties as provided in Section XV of this Decree.

XXVI.
USE OF DECREE

This Decree was negotiated and executed by the United States and the Defendants in good faith to avoid further expensive and protracted litigation. The execution of this Decree is not an admission of liability on any issue dealt with in this Decree except as set forth in Section I of this Decree. Accordingly, this Decree shall not be admissible in any judicial or administrative proceeding, except for any proceeding for the enforcement of this Decree, for the resolution of disputes under this Decree, to compel compliance with this Decree, or to impose sanctions for violations of this Decree.

XXVII.
EFFECT OF SETTLEMENT

A. The parties hereto agree, and this Court hereby finds and concludes, that Section 113(j)(2) of CERCLA, 42 U.S.C. § 9613(j)(2), as amended, shall govern matters arising in connection with this Decree.

B. The Defendants shall not make or assert any claim, directly or indirectly, under statutory or common law against the United States regarding response actions taken to respond to the release and threatened releases of hazardous substances, pollutants or contaminants at or from the Site, including claims

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against the Hazardous Substances Superfund under Sections 106, 107, 111, or 112 of CERCLA, 42 U.S.C. §§ 9606, 9607, 9611, or 9612, or any other provision of law, respecting past costs or costs incurred in complying with this Decree. Nothing in this Decree shall be deemed to constitute a decision on preauthorization under Section 111(a)(2) of CERCLA, 42 U.S.C. § 9611(a)(2).

C. The Defendants agree that with respect to any suit or claim for contribution brought against them for matters covered by this Decree, they will timely notify the United States of the institution of such suit or claim.

D. The Defendants hereby waive any right they may have to raise a claim-splitting defense, based upon the lack of resolution in this Decree of all claims regarding the release or threatened release of hazardous substances at or from the Site, including those set forth in the United States' complaint in this action, in any future proceeding by the United States.

E. Nothing in this Decree shall be construed to release the Defendants from liability arising out of or relating to the negligent acts or omissions, or the negligent performance of the tasks required under this Decree, by Contractors of the Defendants. Furthermore, failure of a Contractor of the Defendants to perform shall not excuse the Defendants from meeting any requirements of this Decree, except as provided in Section XVI (Force Majeure).

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F. Nothing in this Decree shall limit EPA's authority to order a halt to the Work or other activities required by this Decree, or to limit any authority of EPA to conduct response actions or take enforcement actions, including work pertaining to any other operable units, and to seek reimbursement for any response actions conducted.

G. Nothing in this Decree should be construed to release any claims, causes of action, or demands in law or equity against any person, firm, partnership, or corporation not a signatory to this Decree for any liability it may have arising out of or relating in any way to the generation, storage, treatment, handling, transportation, disposal, or release of any hazardous waste, solid waste, pollutant, contaminant, or hazardous substance found at, taken to, or taken from the Site. Nothing contained in this Decree shall affect any claim or cause of action of any Party to this Decree against third parties.

H. EPA reserves the right to take any and all enforcement or response actions pursuant to CERCLA or other legal authority, including the right to seek monetary penalties or injunctive relief for any willful violation, failure, or refusal to comply with the Decree.

I. Nothing in this Decree should be construed to release the Defendants from any liability for failure to perform the Work in accordance with the Decree, the ROD, and the Work Plan. The parties expressly recognize that this Decree and the successful completion and approval of the Work or any other obligations

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under this Decree do not represent satisfaction, waiver, release, or covenant not to sue, of any claim of the United States against the Defendants relating to the Site, except as specifically provided in this Section of the Decree.

J. The United States may undertake any action under Sections 104, 106, 107, or 122 of CERCLA, 42 U.S.C. §§ 104, 9606, 9607, or 9622, or any and all actions pursuant to CERCLA, or any other available legal authority. Nothing in this Decree shall preclude EPA from undertaking any additional enforcement actions and/or other actions it deems necessary for any purpose including protection of public health, welfare, and the environment. Such determinations and actions are not subject to dispute resolution under this Decree.

K. As to the acts or omissions of Contractors, the Defendants shall not assert a defense based on Section 107(b)(3), 42 U.S.C. § 9607(b)(3), in any action related to the enforcement of this Decree.

L. The status of the Site with respect to inclusion on or removal from the National Priorities List, which is set forth at 40 C.F.R. Part 300, shall in no way affect or diminish the rights and authorities of the United States under this Decree or under any applicable provision of law, and Defendants shall not assert a defense based on such status in any action related to the enforcement of this Decree or to the recovery of costs by the United States.

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XXVIII.
PUBLIC COMMENT

Except as specifically provided otherwise in this Decree, this Decree and amendments thereto shall be lodged with the Court for a period of 30 days for public comment pursuant to the provisions of Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7, and it shall not be submitted to the Court for execution and entry until the expiration of that period.

XXIX.
RETENTION OF JURISDICTION

A. This Court shall retain jurisdiction over this Decree for purposes of ensuring compliance with its terms and conditions.

B. Notwithstanding any other provision in this Decree the United States and the Defendants each retain the right to enforce the terms of this Decree and take any action authorized by law not inconsistent with the terms of this Decree.

C. The United States reserves the right to enforce Federal environmental laws, and State environmental laws where such are part of an authorized or delegated program under RCRA or any other statute, independently from this Decree.

XXX.
EXECUTION OF DECREE

This Decree may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

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IT IS SO AGREED AND PROPOSED BY THE PARTIES FOR ENTRY BY THE COURT:

FOR THE UNITED STATES

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FOR THE DEFENDANTS

APPROVED AND SO ORDERED THIS ____ DAY OF _____, 1989.

U.S. District Judge